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No. 587

In the Supreme Court of the United States

OCTOBER TERM, 1959

FRED WILLIAMS, PETITIONER

v.

WALTER A. SAHLI, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. 25-27) is not reported. The opinion of the district court (R. 72a-80a) is reported at 166 F. Supp. 734.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1959. The petition for a writ of certiorari was filed December 14, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board of Immigration Appeals properly declined to revoke an order of deportation and reopen the proceedings in order to enable petitioner to apply for suspension of deportation, where the Board found that petitioner failed to allege facts showing his eligibility for such relief.

STATEMENT

In deportation proceedings in 1954, petitioner, a British national, was found to have been a member of the Communist Party from 1931 to 1949 and was ordered deported under § 241(a)(6)(C) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.* (R. 3a, 21a). The order was sustained in review proceedings. *Williams* v. *Butterfield*, 145 F. Supp. 567 (E. D. Mich.), affirmed *sub nom. Williams* v. *Malcahey*, 250 F. 2d 127 (C.A. 6), certiorari denied, 356 U.S. 946.

Thereafter, on May 9, 1958, petitioner moved the Board of Immigration Appeals to vacate the order and reopen the proceedings to permit him to apply for suspension of deportation under § 244(a)(5) of the Act (R. 8a-12a). The motion, which incorporated by reference (R. 9a-10a) the allegations of a prior motion on another ground (R. 13a-19a), offered to prove the following facts as to petitioner's Communist Party membership (R. 11a, 16a):

> Following the enactment of the Taft-Hartley Act in ——, my Local Union—Local 208, UAW CIO, of which I was the business agent—required that all officers execute the Taft-Hartley affidavit

disclaiming membership in the Communist Party.[1] I thereupon discontinued my membership in that organization and executed the affidavit as shown by the attached Exhibit "A" which I issued to all members of my Local Union. [The attached exhibit stated: "On August 8th, 1950 * * * I signed the affidavit * * *" (R. 29a).]

I am not now, nor have I been at any time since the above affidavit was executed, a member of the Communist Party.

* * * * *

Prior to the time of his arrest by the Immigration Service in May, 1954, Petitioner had voluntarily discontinued all membership or affiliation with the Communist Party and he has not engaged in any Communist Party activity since 1950.

The Board, noting that petitioner had not complied with the requirement that suspension applications be submitted before the final order of deportation is entered, denied the motion. It pointed out that the uncontradicted evidence of record established that petitioner had been a member of the Communist Party from 1942 to 1949, that it had been so found in the deportation proceedings, and that petitioner in his motion made no allegation that his membership terminated prior to 1949 (R. 21a-22a). The Board said (R. 22a):

* * * An applicant for suspension of deportation who is charged with having been a member of a subversive organization is required to prove that

[1] As petitioner later testified in the district court (R. 61a-62a) and admits here (Pet. 9-10), the Local did not require its officers to execute Taft-Hartley affidavits until 1949.

> he has not been a member of a subversive organization for ten years preceding his application for suspension of deportation. Obviously, the respondent cannot do this. No purpose would therefore be served in reopening proceedings to enable him to apply for suspension of deportation. * * *

Petitioner then brought this action to set aside the Board's order denying the motion. The district court (R. 72a-80a), affirmed by the court of appeals (Pet. 25-27), dismissed the complaint, finding that the Board had not abused its discretion in refusing to reopen the proceedings.

ARGUMENT

A sufficient ground for the Board's denial of petitioner's motion to reopen the proceedings was that he failed to allege facts which, if proved, would establish his eligibility for suspension.[2] To be eligible for suspension under § 244(a)(5), an alien must be "physi-

[2] Hence there is no occasion to reach the question whether the Board could, in its discretion, have refused to reopen the proceedings to entertain the tardy application even if the allegations had been sufficient. We note, however, that the reason proffered by petitioner for not having complied with the statutory requirement that the application be made before the final order of deportation—that he could not have so applied without admitting the then-contested issue of alienage—seems an inadequate justification for his delay. While the standard application form does, as petitioner claims (Pet. 14), recite "I [name] am alien", it is difficult to believe that petitioner, represented throughout by counsel, lacked the ingenuity to adapt the form to his case by crossing out the word "alien" and explaining that he disputed his alienage. The formal deficiency of the form to allow for the uncommon case in which alienage is in issue is hardly a sufficient reason for waiting until the eve of deportation, after four years of litigation, to apply for discretionary relief, frustrating the purpose of the statute to have the issues of fact going to deportability and to eligibility for suspension presented at one hearing.

cally present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and [prove] that during all of such period he has been and is a person of good moral character" (Pet. 3). It was found in the original deportation proceedings that petitioner had been a member of the Communist Party until 1949, and in his motion to reopen petitioner offered to prove only that he had not been a member "since the [Taft-Hartley] affidavit was executed" (August 8, 1950) or "since 1950" and that he had terminated his membership sometime after his local union required noncommunist affidavits to be filed (now admitted to have been in 1949). His motion and supporting affidavits, therefore, not only failed to allege that ten years had elapsed since the termination of his Party membership but affirmatively showed the contrary.[3]

Petitioner makes the novel contention that it is necessary only that ten years have elapsed since he *became* a member of the Party, not since he *terminated* his membership, and that continued membership during the ten-year period is relevant only in determining

[3] In the district court proceedings petitioner sought to show, contrary to the allegations of his motion to the Board, that he terminated his Party membership in 1947 (R. 45a-48a; Pet. 8-9). The question, however, is whether the Board erred in denying the motion on the offer of proof made to it, and the belated and contradictory allegation made in the district court is irrelevant. Moreover, termination of petitioner's membership in 1947 would still have been within less than ten years of the 1954 deportation proceedings, when the application for suspension was required to have been made, and there is a question whether, even if the untimeliness of his application were waived, petitioner could properly rely on the period of his delay to satisfy the ten-year requirement.

his "good moral character" during that period. The insubstantiality of that argument is shown by its bizarre implications: a longstanding member of the Party who had never resigned could satisfy the requirement while an alien who joined the Party within the ten-year period and resigned one month later could not. The error in petitioner's argument is that being a member of the Party is the "commission of an act," constituting a ground for deportation, not the "assumption of a status" as petitioner claims, and so long as the alien continues to commit that act his period of residence for suspension purposes cannot begin to run. The purpose of the suspension provision is to afford relief to aliens who, although having once committed acts for which they are subject to deportation, have demonstrated their rehabilitation by ten years of good behavior. It is clearly inconsistent with that purpose to allow relief to an alien who, during the ten-year period, continues to commit the very act for which deportation is prescribed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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